UNITED ASIAN BANK BHD.

v.

HONG HUAT REALTY (M) SDN. BHD.

HIGH COURT MALAYA, JOHOR BAHRU
MAHADEV SHANKAR J
[COMPANIES WINDING-UP NO. 42-41 OF 1986]
11 OCTOBER 1986

CIVIL PROCEDURE: *Bank overdraft - Security and charge - Guarantees - Non-payment of overdraft - Application for winding-up under s. 218 of the Companies Act 1965.*

The respondents in the course of their activities obtained an overdraft from the petitioner for which the respondents gave the petitioner, a number of charges in respect of various properties belonging to the respondents, personal guarantees of the directors of the respondents and the petitioners also held a fixed deposit from the respondents. After a number of transactions the overdraft was reduced by the application of the fixed deposit and on 26 March 1982 it stood at RM1,256,523.23. In September 1983 the petitioners sent to the auditors of the respondents a statement which was not disputed by the respondents that the debit balance as at 30 September 1982 was RM616,233.80. On 13 February 1984 the petitioners served a notice of default in respect of the charges relating to two properties. Section 254 of the National Land Code was invoked and an order for sale applied for through the collection's office. The sale however did not materalize. The debt continued to amount and on 1 April 1986 the petitioners filed through their solicitors the statutory notice in accordance with the Companies Act to the respondents for the payment of the debt within 21 days failing which the respondents would be deemed unable to pay its debts and an action would then be taken to have the company wound up. The debt was not paid, the petition presented and advertised. The company's other creditors too gave notice of their intention to appear at the hearing.

Held:

[1] After some confusion as to the status of a certain group of solicitors to represent some alleged creditors that the only opposition to the petition was from the respondents.

[2] The contention that the debt was disputed and could not therefore be made the subject matter of a winding-up petition did not apply to the present case. Although is its correct to say that the process for the winding-up of companies were not designed to take the place of action at law to determine the liability of guarantors or persons who received goods, this was not such a case as there was no *bona fide* dispute of the debt.

[3] None of the cases cited by the Counsel for the respondents supported his contention that economic hardship in a particular case or on a nationwide scale due to recession could by itself relieve a party of the adverse consequences of a contract; although judicial intervention may be possible not on poverty or hardship but oppression and the absence of a legitimate interest.

[4] Whether what is dealt with was a foreclosure action or a petition of winding-up, the Court was entlitled to inquire into "the existence of any cause to the contrary" as to why the land should not be sold or "any reason as to why the petition to wind-up should not be made" either because the debt was not valid in equity or because the circumstances were such that it would be right to refuse the application. If the petitioner's conduct was so

oppressive as to make the presentation of the petition an abuse of process then too the petition should be rejected. However the present case was not of that type.

[5] The third contention of the repondents, which was that, to allow the petition to proceed would be to permit a multiplicity of proceedings which was an abuse of process was to be rejected. The enforcement by the petitioner of the alternate remedy does not amount to a representation that it would not resort to other remedies open to it.

[Petition allowed. Respondents to pay costs.]

Cases referred to:
Ng Ah Kway v. Tai Kit Enterprise Sdn. Bhd. [1986] 1 MLJ 58
Re Bryant Investment Co. Ltd. [1974] 2 All ER 683
Stonegate Securities Ltd. v. Gregory [1980] 1 All ER 241
F.J. Reddacliffe & Associates Pty. Ltd. v. Arc Engineering Pty. Ltd. [1978] 3 ACLR 426
Ng Yik Seng & Anor. v. Perwira Habib Bank (M) Bhd. [1980] 2 MLJ 83
Keng Soon Finance Bhd. v. M.K. Retnam Holdings Sdn. Bhd. & Ors. [1983] 2 MLJ 384
Tengku Farid bin Tunku Hussain & Ors. v. United Asian Bank Bhd. [1985] 2 MLJ 199
Bank Bumiputra Malaysia Berhad v. Esah binti Abdul Ghani [1985] CLJ (Rep) 41
Moor v. Anglo-Italian Bank [1879] 10 Ch D 681
Re Borough of Portsmouth Tramways Company [1892] 2 Ch D 362
Malayan Plant (Pte) Ltd. v. Moscow Narodny Bank Ltd. [1980] 2 MLJ 53
White & Carter (Councils) Ltd. v. McGregor [1962] AC 413
Clea Shipping Corporation v. Bulk Oil International Ltd. [1984] 1 All ER 129
Re Camburn Petroleum Products Ltd. [1979] 3 All ER 297
Verschures Cremeries Ltd. v. Hull and Netherlands Steamship Co. Ltd. [1921] 2 KB 608
Benjamin Scarf v. Alfred George Jardine [1882] 7 HL (E) 345

Legislation referred to:
National Land Code 1965, ss. 254, 256, (3)

Other sources referred to:
Companies Act 1948, Buckley, 14th Edn.
Sourcebook of Malaysian and Singapore Company Law [1986], Phillip N. Pillai

For the petitioner - Tan Jin Wah; M/s. Ong Ban Chai & Co.
For the respondent - Subra Naicker; M/s. Subra Naicker & Co.

JUDGMENT

Mahadev Shankar J:

This is a petition by United Asian Bank Berhad (hereafter referred to as 'the bank') to wind-up Hong Huat Realty (M) Sdn. Bhd. ('the company').

The company was incorporated on 14 February 1972 with a paid up capital of RM560,002. In the course of its business activities it opened a current account No. 05-059 with the bank. Through that account the company obtained overdraft facilities. For these facilities the company offered collateral by way of a charge for RM400,000 on the land comprised in EMR 185 for Lot 1536 and EMR 187 for Lot 1538 in the Mukim of Senai/Kulai valued at the time at about RM500,000. There was also a separate charge for RM100,000 on the land comprised in EMR 13 Lot 52 in the Mukim of Kahang valued at about RM293,000. There was also a deposit of title deed under Johore Government Grant No. 9279 Lot 2799 for RM40,000. The bank also held a personal guarantee from each of the company's directors Dato Yap Sing Hock, Yap Seng Chang and A. Hamid bin Mohamed Thair for RM400,000. And the bank held a fixed deposit from the company of RM1.2 million.

In the usual course of its business, the bank sent monthly statements to the company. By February 1982 the overdraft in the company's account stood at RM1,801,167.79. On 26 March 1982 this figure was reduced by the application of the fixed deposit plus accrued interest of RM1,256,523.23 to reduce the overdraft to a figure of RM544,639.56. For all practical purposes the account became stagnant after that. Monthly statements continued to be sent. The interest continued to mount. Nothing was paid in. By February 1986 the amount due had swollen to RM1,028,453.02.

Shortly after the application of the fixed deposit to the reduction of the overdraft in March 1982 some correspondence was exchanged between the company and the bank, This related to the interest rate applicable. But the queries appear to have been resolved by a personal meeting between the bank and one of the company's directors, one Francis Ng. The company did not dispute a letter sent by the bank to the company's auditors on 14 September 1983 in which it was certified that at the close of business on 30 September 1982 the debit balance was RM616,233.85.

On 13 February 1984 the bank served a notice of default with respect to the charge relating to EMR 185 and 187 aforesaid. The notice states that the debt outstanding as at 30 November 1983 was RM735,034.76 and that further interest was accruing at the rate of 13.75% per annum with monthly rests. Section 254 of the National Land Code was invoked and in the event of failure to pay up the debt within 7 days, notice was given that the bank proposed to apply for an order of sale. This was done through the Collector's office but the sale did not materialise.

The debt and the interest continued to mount and by 27 February 1986 it stood at RM1,028,453.02 ('the debt').

On April Fool's day 1986, the bank through its solicitors issued the statutory notice in accordance with the provisions of the Companies Act, to the company for the payment of the debt within 21 days failing which the company would be deemed to be unable to pay the debt and action would then be taken for the winding-up of the company. A copy of this notice was sent to each of the directors of the company.

The debt was not paid. The petition was filed. It was advertised. This attracted the attention of the company's other creditors who gave notice of their intention to appear at the hearing which eventually took place on 24 September 1986.

The company was involved in two housing projects. One was known as the Saleng Project and the other as the Taman Nora Housing Project. From the results of searches made in the Companies Registry and filed by the bank in these proceedings, it appears that the company had charged the land comprised in Grant No. 3951 for Lot No. 1169 in the Mukim of Senai/ Kulai, Johore Bahru in favour of Asiavest Merchant Bankers (M) Bhd. for RM2 million. These monies were to be released by way of end financing by Development and Commercial Bank, Kulai. The company had also charged the land comprised in EMR Nos. 211 and 212 and for lots 212 and 213 in the Mukim of Plentong to Asiavest Merchant Bankers (M) Bhd. for RM4 million. It would appear that these properties had been encumbered in future by way of an assignment and a charge in escrow in favour of Perwira Habib Bank (M) Bhd. for RM11,500,000.

From the sale and purchase agreement relating to these housing projects, it would appear that the law firm of M/s. Wong & Paramjothy were concerned in their preparation and execution. After the petition was advertised, this firm filed a notice dated 14 July 1986, of their intention to appear on the petition. They claimed to be acting for all the purchasers

named in the schedule attached to the notice. The first lists 230 purchasers in the Taman Saleng Project and the second part lists 307 purchasers in the Taman Nora Project. Mr. Tan Jin Wah who appeared for the petitioners at the hearing submitted that the list must have been supplied to M/s. Wong & Paramjothy by the company and that in fact M/s. Wong & Paramjothy, in the absence of evidence to the contrary, must be persumed to have had no instructions to act for the purchasers in question. Whilst this Court is not prepared to go that far, the fact remains that the time of the hearing M/s. Wong & Paramjothy did not appear to oppose the petition. Indeed as Mr. Tan pointed out, a substantial number of the persons listed in the schedule supplied by M/s. Wong and Paramjothy, appear as supporting creditors in lists which have been filed by the other solicitors who stood up to be counted as supporters of the petition for the winding-up when it was called on for disposal. There were 9 such solicitors and a simple addition of those of them who chose to quantify their claim resulted in a total of approximately RM1.25 million. Some of them were unpaid creditors for goods sold and delivered to the company. A preponderant number of the supporting creditors were purchasers in the two housing projects who had unsatisfied claims against the company for statutory compensation under the Housing Developers Act for late delivery. A large number of them had in fact already obtained judgments against the company and these had not been satisfied.

In result, the only voice that was heard in opposition to this petition was from the company itself presented by its solicitors M/s. Gan & Lim and Mr. Subra Naicker of Counsel, who advanced three grounds why the petition should be dismissed.

Firstly it was contended that the debt was disputed, and could therefore not properly be made the subject matter of a winding up petition. He relied on my previous decision - *Ng Ah Kway v. Tai Kit Enterprise Sdn. Bhd.* [1986] 1 MLJ 58. The distinction between that decision and the facts in the present case is that the debt there was not a liquidated sum. It was a claim by a building contractor for the cost of works he had carried out, the value of which was seriously disputed. *Re Bryant Investment Co. Ltd.* [1974] 2 All ER 683 was also relied upon. But in that case there was a serious dispute as to whether the debt was in fact due on the date when the statutory demand was made. Another case cited was *Stonegate Securities Ltd. v. Gregory* [1980] 1 All ER 241. The statutory demand in that case was for £33,000 which the petitioner alleged was due to him from the company. The company denied that it presently owned him £33,000 or any part of that sum. In other words the entire debt was disputed. The Court held on the facts before it that there was a *bona fide* dispute whether the money claimed was presently due and granted an injunction restraining the claimant from presenting a petition for the winding-up of the company.

I fully agree with Counsel for the company that a winding-up petition should not be used as a means for resolving disputes which ought to be settled in ordinary litigation. I have taken note of *NKM Development Sdn. Bhd. v. Irex Sdn. Bhd.* - an unreported decision by V.C. George J Which is digested in the *Sourcebook of Malaysian and Singapore Company Law* [1986] by Philip N. Pillai, and *F.J. Reddacliffee & Associates Pty. Ltd. v. Arc Engineering Pty. Ltd.* [1978] 3 ACLR 426 where Needham J held that the processes for the winding-up of companies are not designed to take the place of actions at law for the determination of the liability of guarantors or persons who received goods on sale.

But this is not that kind of a case. There is no *bona fide* dispute of the debt. In fact both Counsel for the company and Mr. Gan have said in so many words that the company is prepared to admit that it owes the bank about RM0.5 million. But they were unable to give any indication as to when the company would be in a position to pay even this amount.

Furthermore the crux of the case is whether the company is solvent. Two points will serve to settle that issue. In the first place if the company was solvent, if would have been a simple matter for it to file a certified balance sheet to show that its assets exceeded its liability and that it had ready money to pay its debts as and when they fell due. The fact that this evidence was not made available must result in an adverse inference being drawn against the company. Secondly, there was a preponderance of evidence that the money claimed by the bank was in fact due and owing. One must remember that month after month the bank here had been sending statements of the company's indebtedness. If a defendant denies that he owes money, the denial must condensed on particulars. But here was a case where the denial was not only bare, it was also barren in the sense that absolutely no material was furnished to pinpoint in what manner the bank had claimed more than its rightful due.

In dealing with the definition of commercial insolvency, Mr. Tan drew my attention to the passage appearing at p. 534 of Buckley - *Companies Act* 1948 (14th Edn.). With respect I would venture to state the words in question deserve the strongest emphasis:

> The particular indications of insolvency mentioned ... are all instances of commercial insolvency, that is, of the company being unable to meet current demands upon it. In such a case it is unless to say that if its assets are realised there will be ample to pay 20 shillings in the pound; this is not the test. A company may be at the same time insolvent and wealthy. It may have wealth locked up in investments not presently realisable; but although this be so, yet if it have not assets available to meet its current liabilities, it is commercially insolvent and may be wound up.

In all the circumstances it is the view of this Court that the first ground is devoid of merit.

The second ground which was advanced for the company was indeed a most interesting one. What was submitted was that in these times of depressed economic circumstances, and acute recession, the Courts no longer permit lenders a free hand in enforcing their legal remedies. So it was contended, that where there was genuine hardship which would make the enforcement of legal remedies a useless piece of ligitation, equity should intervene to relieve the debtor and to rein in the creditor.

With respect to Counsel for the company, this submission is somewhat novel, and I propose to deal with the cases he chronological sequence. *Ng Yik Seng Anor. v. Perwira Habib Bank (M) Bhd.* [1980] 2 MLJ 83 was a case where the bank held by way of collateral security for its overdraft a charge on a piece of property and also a personal guarantee from two directors of the debtor company. Instead of realising the charge first, the bank sued the guarantors. Delivering the judgment of the Federal Court, Chang Min Tat FJ said at p. 84:

> The amount outstanding on the overdraft was only RM251,091.64. *Prima facie,* therefore, the realisation of the charge would more than repay the overdraft. In these circumstances the appellants contended that "in law and equity" they should only be called on to meet their guarantee if there should be any deficit, after the sum to be realised from the sale of the charged property had been determined. This contention is not without attraction. We have not heard any substantial submissions at length on this point which was not ruled on in the Court below, but while it is uncertain that the claim against the appellants in the circumstances of a charge is bad "in law and equity", it is, in our view, clear that in such circumstances an action to obtain judgment against the guarantors which would open avenues of execution to the chargee and even bring the guarantors into the bankruptcy Court when in the final accounting, the appellants needed not to be called to honour their guarantee, would be an abuse of the process of the Courts. Where the plaintiff of the litigation had no substantial interest in the subject which could no easily be rectified and the action was a useless piece of litigation, the Court dismissed it: see *Webster v. Bakewell* RDC (No. 2). That was a case

where the facts were present at the issue of the writ. The present case may not be so but may well turn out to be effectively a case of, to echo the words used, a useless piece of litigation, so that a Court may very well in the exercise of its discretion stay, not dismiss, the action of the sale of the property that had been charged to the bank. A stay (or even dismissal) of proceedings may "often be required by the very essence of the justice to be done," per Lord blackburn in *Metropolitan Bank v. Pooley,* so as to prevent parties being harassed and put to expense by frivolous vexatious or hopeless litigation. See also *Riches v. Director of Public Prosecutions* per Lawton LJ at pp. 1027 and 942 of the respective reports in [1973] WLR and [1973] 2 All ER 935.

The next case was *Keng Soon Finance Bhd. v. M.K. Retnam Holdings Sdn. Bhd. & Ors.* [1983] 2 MLJ 384. There the lender had agreed to finance a housing development with full knowledge that houses to be built on the land which was to be the subject matter of the charge, had already been sold to an army of sub-purchasers. It was a term of the contract between the lender and the housing developer that the loan would be released progressively upon payment of the housing developer's architect's certificates. The housing developer was obliged to service the interest by monthly instalments. This he did not do. The lender thereupon refused to honour the developer's architect's certificates. The development then came to a standstill and the lender sought to enforce the charge by applying to Court for an order of sale. This was refused because "on an application for sale of the land charged the Court has not only to apply the law but also to invoke the aid of equity in order to be satisfied whether a cause to the contrary has been shown or not in accordance with s. 256(3) of the National Land Code. The chargee must not only come to Court with proof that the chargor has defaulted, but also with proof that the chargee himself is free of fault and that he was not guilty of any unreasonable conduct, and that there was no right of innocent third parties to be affected by the order." In the circumstances of that case, the Federal Court held that the sub-purchasers of the building lots had acquired equities to the land and that the sale order sought by the finance company should be refused because its conduct had been unreasonable.

The third case cited was *Tengku Farid bin Tunku Hussain & Ors. v. United Asian Bank Bhd.* [1985] 2 MLJ 199. This was also a housing development which had failed. Initially the bank had sued the developer company for the total debt. But subsequently the bank initiated proceedings against the guarantors who applied to Court to stay the proceedings against them until after the bank had foreclosed the charges in its favour and realised their securities against the company. That application was refused in the first instance and on appeal the Federal Court held that although the guarantor has an equity against the creditor, if the can show that the creditor is attempting to place the whole burden of the debt unfairly upon him, in the instant case the lands which were charged as security for the loan had already been sold to sub-purchasers who had equities. Between the equities of the guarantors and the sub-purchasers the Court held that its duty was to protect the sub-purchasers as innocent parties and the bank was entitled to proceed to recover the indebtedness from the guarantors.

As against these authorities, Mr. Tan Jin Wah, Counsel for the bank, drew the attention of the Court to *Bank Bumiputra Malaysia Berhad v. Esah binti Abdul Ghani* [1985] 1 CLJ (Rep) 41. This is also a decision of the Supreme Court. The judgment makes it quite clear that *Ng Yik Seng Anor. v. Perwira Habib Bank Malaysia Bhd.* [1980] 2 MLJ 83 was not only not followed but was not regarded as binding authority. The other two cases, just referred to, were not cited to the Supreme Court. Here too the bank had lent money to a principal debtor and as security had taken a charge over land belonging to the principal debtor and two others. By way of further security the bank had also obtained a guarantee from Esah binti Abdul Ghani. When the debt was not paid, the bank in the first instance initiated

foreclosure proceedings. Upon the death of the owners of the land, the bank did not proceed with the foreclosure proceedings. Instead it obtained judgment against the principal debtor and the guarantor and then filed a bankruptcy notice against the guarantor to pay the amount owing. The guarantor failed to do so. The bank filed a creditor's petition. The guarantor applied for a stay. In the Court of first Instance the Judge castigated the bank for going after the guarantor before it had exhausted its other remedies. But the Supreme Court held that the charge and the guarantee were merely collateral security and that the guarantor has no special right to demand that the creditor special right to demand that the creditor called upon the principal debtor to pay off the debt before asking the guarantor to pay. In other words, everything else being equal, it does appear that the guarantor has no equity which he can invoke to postpone his exposure to liability.

How do these decisions affect the present case?

Mr. Subra Naicker is contending that the bank must first complete its foreclosure proceeding and only then sue the company.

But Counsel of the bank, in addition to inviting my attention to the judgment of the Supreme Court in *Bank Bumiputra Malaysia Bhd. v. Esah binti Abdul Ghani (supra)* also relied upon *Moor v. Anglo-Italian Bank* [1879] 10 Ch D 681 where it was held that there is no mode in a winding-up of applying the bankruptcy rule that a petitioning creditor with a secured debt must either give up or value his security, in the latter case proving for the difference as there are no means of knowing before the winding-up whether the company is insolvent or not.

The insolvency just referred to must of course be actual insolvency, as opposed to commercial insolvency.

He also relied on the passage appearing in Buckley at p. 539 which reads:

> A secured creditor may present a petition, and he does not by presenting one, elect to give up his security or in any way lose his right to it. Where a mortgagee who has presented a winding-up petition gives notice of intention to exercise his power of sale in his mortgage, he may be restrained from so doing pending the hearing of the petition ...
>
> > But a secured creditor be his security what it may, is a creditor. He can recover judgment. And if he presents a winding-up petition, there would seem to be no reason why by exercising his remedy as a secured creditor he should be deprived of his right to a winding-up order.

Re Borough of Portsmouth Tramways Company [1892] 2 Ch D 362 is the case which supports the last proposition.

Each of the cases cited by Counsel for the company involve the foreclosure of a charge which brought into play s. 256 of the National Land Code which reads:

> (3) On any such application, the Court shall order the sale of the land ... to which the charge relates unless it is satisfied of the existence of cause to the contrary.

Mr. Tan was at pains to point out that this is a petition for winding-up. He cited the passage appearing in Buckely at pp. 522, 523 which was approved by the Privy Council in *Malayan Plant (Pte.) Ltd. v. Moscow Nardony Bank Ltd.* [1980] 2 MLJ 53 at p. 54. It reads:

> A creditor who cannot obtain payment of his debt is entitled as between himself and the company *ex debito justitiae* to an order if he brings his case within the act. He is not bound to give time. And notwithstanding a voluntary winding-up, on proving his debt and that it remains unsatisfied he will be so entitled.

> It is not a discretionary matter with the Court when a debt is established, and not satisfied, to say whether the company shall be wound up or not; that is to say, if there is a valid debt established, valid both at law and in equity. One does not like to say positively that no case could occur in which it would be right to refuse it, but ordinarily speaking, it is the duty of the Court to direct a winding-up. (Emphasis added.)

Mr. Subra Naicker claims that the company has an equity against the bank entitling it to have this petition dismissed. With respect I think we need to redefine our terms.

Standing alone the word "equity" has been defined as "that portion of remedial justice which was, formerly, exclusively administered by a court of equity as contra-distinguished from that portion which was formerly, exclusively administered by a Court of common law" (see *Judicial Dictionary*, Stroud's, 4th Edn. Vol. II p. 928). Perhaps it would be more precise to refer to a 'right in equity'. (see Stroud's *ibid* Vol. 4 p. 2398).

In the nature of things, such a right in equity cannot exist in a vacuum. There must be circumstances which give rise to that right.

In *Kheng Soon Finance Bhd. v. M.K. Retnam Holdings Sdn. Bhd.* the lender had actual knowledge of the rights of the sub-purchasers in the property which was mortgaged and what is more, it had a legal obligation to make the progress payments upon presentation of the architect's certificates.

It is difficult to see what assistance the company can derive from *Tengku Farid bin Tunku Hussian & Ors. v. United Asian Bank Bhd.* (*supra*). There the bank had taken out a writ against the company for the principal debt and interest. Subsequently the bank sued the guarantors. It does not appear that any action had yet been taken by the bank to foreclose the charge upon the company's land. This omission did not preclude the bank from proceeding against the guarantors. Whilst the Court took cognizance that the guarantor had a right in equity against the creditor if he could show that the creditor was attempting unfairly to place the whole burden of the debt upon him, the ratio of the case appears to be that the mere fact that the bank did not foreclose on its charge, could not give rise to such an equity. What should not be overlooked is the fact that the sub-purchasers of the land covered by the charge were not parties to the action, and the precise range and impact of the guarantor's equity, had matters been otherwise, did not need to be adjudicated.

None of the cases cited by Counsel for the company supports the proposition that economic hardship in a particular case (whether brought about by bad luck or bad management) or on a nationwide scale due to recession could by itself relieve a party of the adverse consequences of a contract. Parliament may do so (see for example BMA Moratorium Proclamations and the Debtor & Creditor (Occupation Period) Ordinance 1948.)

Two passages from *White & Carter (Councils) Ltd. v. McGregor* [1962] AC 413 should serve to highlight the problems here:

See Lord Reid at pp. 430, 431:

> The other ground would be that there is some general equitable principle or element of public policy which requires this limitation of the contractual rights of the innocent party. It may well be that, if it can be shown that a person has no legitimate interest, financial or otherwise, in performing the contract rather than claiming damages, he ought not to be allowed to saddle the other party with an additional burden with no benefit to himself. If a party has no interest to enforce a stipulation, he cannot in general enforce a stipulation, he cannot in general enforce it: so it might be said that, if a party has no interest to insist on a particular remedy, he

ought not to be allowed to insist on it. And, just as a party is not allowed to enforce a penalty, so he ought not to be allowed to penalise the other party by making one course when another is equally advantageous to him.

And Lord Hodgson at p. 445:

It is trite that equity will not rewrite an improvident contract when there is no disability on either side. There is no duty laid upon a party to a subsisting contract to vary it at the behest of the other party so as to deprive himself of the benefit given to him by the contract. To hold otherwise would be to introduce a novel equitable doctrine that a party was not to be held to his contract unless the Court in a given instance thought it reasonable so to do. In this case it would make an action for debt a claim for a discretionary remedy. This would introduce an uncertainty into a field of contract which appears to be unsupported by authority either in English of Scottish law save for the one case upon which the Court of Session founded its opinion and which must, in my judgment, be taken to have been wrongly decided.

The judicial intervention in such cases is based not on poverty or hardship but oppression and the absence of a legitimate interest: See *Clea Shipping Corporation v. Bulk Oil International Ltd.* [1984] 1 All ER 129. The choice that is forced upon the claimant is a remedy in damages rather than a claim for full remuneration for useless work.

What the company is seeking to do here is to spike the guns of the bank. A right in equity normally only arises if the holder of that right is said to have been induced to act to his detriment in reliance upon some representation of fact. Omissions to give notice of facts may also give rise to equitable estoppels if there is a fiduciary relationship which imposes a duty to speak up. The special legal relationship of the parties may give rise to a right in equity by waiver or acquiescence. But these features are conspicuous by their absence in this case. When the bank took their securities in all the forms available to them, they were willingly given by the company and its directors. If it was intended that the bank should be limited in the simultaneous exercise of all the remedies open to it, provision should and would have been made. And as for the alleged oppression, surely it was open to the company and its directors to approach other sources for the moneys requires if it was a fact that the market value of the collateral offered far exceeded the face value of the loans.

Coming back to the present, it seems to me that whether one is dealing with a foreclosure action or a petition for winding-up, the Court is entitled to inquire into "the existence of any cause to the contrary" as to why the land should not be sold or "any reason why the petition to wind-up should not be made" either because the debt was not valid in equity or because the circumstances were such that it would be right to refuse the application. The words may be different, but the effect is the same.

The right judicial approach has been admirably spelt out by Slade J in *Re Camburn Petroleum Products Ltd.* [1979] 3 All ER 297 at p. 303. He said:

In other words a creditor in the circumstances mentioned is *prima facie* entitled to his order, and is *prima facie* not bound to give time to enable the debtor to pay in my judgment, subject to the discretion given to it by ss. 225 and 346 of the 1948 Act, to which I have already referred, the attitude of the Court should be, and is, essentially unchanged today. While I recognise that it could have the right under those two sections to pay regard to the wishes of the contributaries, in deciding whether or not to make a winding-up order on a creditor's petition, or to adjourn the hearing, in my judgment it can, and should, ordinarily attach a little weight to the wishes of the contributaries, in comparison with the weight it attaches to the wishes of any creditor, who proves both that he is unpaid and that the company is "unable to pay its debts". A creditor giving credit to a company, after all, cannot ordinarily be expected

> to know of or ascertain the potential difficulties which may face the company in regard to the discharge of debts ... on account of other internal matters. He is, I think, ordinarily entitled to assume that his debt will be punctually paid by the company as and when it falls due and to exercise the remedies given to him by s. 224 and the following sections of the 1948 Act if it does not ... In my judgment a creditor in advancing money to a company, at least in the absence of notice to the contrary, is ordinarily entitled to assume that its affairs are being run in such a manner as will enable it promptly to discharge its debts when they fall due, and to say to the Court, and to other persons, that internal disputes between directors and/or contributaries of the company are no concern of his.

A little later Slade J said that the Court would only adjourn a petition if it was satisfied that there were exceptional circumstances that justified such a course.

In the case before me, Mr. Subra Naicker was asking the Court to dismiss the petition. If merely to adjourn a petition to wind-up in the face of objections from the creditor required exceptional circumstances, what more if the petition is to be dismissed? The right in equity in the *Kheng Soon Finance case* surpassed an equitable estoppel. There may be other cases where the Court could be persuaded that it would be right to refuse the petition because the conduct of the petitioner was so oppressive as to make the presentation of the petition an abuse of process.

But this is not such a case. Counsel for the company based his submission simply on the ground that the bank should have exhausted its remedies under the charges made by the company in its favour before the bank filed this petition. In the light of *Bank Bumiputra Malaysia Berhad v. Esah binti Abdul Ghani* (*supra*) that submission must necessarily fail. But if all the circumstances of this case were taken into account, the view of the Court would be no different.

The third submission made by Counsel for the company was that to permit the petition to proceed would be to allow a multiplicity of proceedings which was tantamount to abuse of process. It was here submitted that the bank had already applied to the Collector for an order of sale. On 3 August 1986, after the presentation of this petition, the bank is said to have filed a writ against the company and its three guarantors for payment of the debt. It was contended that by electing to foreclose and by filing the writ against the company and the guarantors, the bank was estopped from proceeding with the petition.

This estoppel contention, with respect, is devoid of merit. The enforcement of alternative remedies does not amount to a representation that the bank will not resort to other remedies open to it.

To substantiate the election submission reliance was placed on *Verschures Creameries Ltd. v. Hull and Netherlands Steampship Co. Ltd.* [1921] 2 KB 608. But the facts of the case have no application to the present case at all. There the vendor sold goods which were forwarded to the customer through a forwarding agent. On arrival of the goods at the destination, the vendor instructed the forwarding agent not to deliver to the customer. The forwarding agent nevertheless delivered. Instead of suing the forwarding agent, the vendor elected to invoice the customer and when he did not receive payment, proceeded to sue the customer and recovered judgment for the price of goods sold and delivered. Failing to get satisfaction he took bankruptcy proceedings against the customer. thereafter he sought to sue the forwarding agent for negligence and breach of duty in delivering the goods to the customer and the Court held that the vendor could not do so. The basis of the decision was that a party could not approbate and reprobate. By suing the customer in contract, the vendor had ratified the delivery and could not go back on it.

The second decision relied upon was *Benjamin Scarf v. Alfred George Jardine* [1882] 7 HL (E) 345. The facts of that case are even further removed from the present. It was there held that a person who supplied goods to a partnership which subsequently went into dissolution and then reconstituted itself as a new partnership with some of the members of the old firm, had to elect whether he would sue the partners of the old firm or the new firm, in the absence of notice of the change but he could not sue both. I am unable to see what the decision has to do with the facts before me.

Counsel for the company, in the course of his submission, sought to suggest that the bank had acted improperly in not enforcing all its remedies earlier and especially in 1982 when the value of the property was much higher. He went on to make out that the bank had been guilty of improper conduct by reason of its inactivity because in the meantime the interest element had caused the debt to outgrow the amount of the original loan.

Lest we arrive with Alice in Wonderland, we should perhaps remind ourselves that the onus of punctually repaying a debt and to see that it is repaid, does not lie on the shoulders of the creditor but upon the debtor. If they did not like the terms of their loan in 1982, it was for the company and its directors to make alternative arrangements by going somewhere else. In this case the bank did not single but any particular guarantor for attention. They attempted to enforce all the remedies open to it, and the salient fact is that although they had knocked on every door open to them, by the date the petition was heard the debt was still unpaid.

Consequently I find no merit in any of the submission made on behalf of the company.

One other feature of this case must now be dealt with. Counsel for the company says that if the petition for winding-up had not been presented and advertised, the other creditors who have now assembled to support the petition would not be in Court and their voices should therefore be disregarded.

With the greatest respect, this submission is not worthy of a moment's consideration. Many of the supporting creditors have got judgments against the company which still remain unsatisfied. Every one of the solicitors for the supporting creditors has informed the Court that if the bank had not presented the petition, they would have taken steps to put the company into liquidation. One of them went so far as to submit that any payment made by the company to the bank at this stage would be objected to as a fraudulent preference.

Whilst it is not necessary for me to decide this, the fact is that the evidence of commercial and actual insolvency in this case was overwhelming and I had no hesitation in making the order sought.

The company must pay the costs of this hearing to the petitioning creditor and the supporting creditors.

Also found at [1988] 2 CLJ 265